81-2398

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MAURICE BENJAMIN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Attorney for Petitioner

Questions Presented

1. Was the denial by the Court below of the Petitioner's request for an extension of time to file his brief on appeal or file an amended or supplemental brief on appeal after he had an opportunity to confer with counsel a violation of the Petitioner's Constitutional right to counsel as guaranteed by the Sixth and Fifth Amendments to the United States Constitution?

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Supreme Court of the United States

OCTOBER TERM, 1981

MAURICE BENJAMIN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The Court of Appeals reversed the judgment of the United States District Court for the Southern District of New York as to three counts of the indictment and affirmed the judgment of the Court as to five counts of the indictment on April 1, 1982. The decision of the Court of Appeals filed April 1, 1982, is reprinted at Pet. App. A, infra, pg. 10.

Jurisdiction

The judgment of the Court of Appeals was entered on April 1, 1982 (Pet. App. A, infra, P 10). The Petitioner made an application for an extension of time to June 30, 1982, to file a Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

On June 2, 1982, the Petitioner's application was granted. A copy of the Court's Order extending Petitioner's time to file the Petition For Writ of Certiorari is reprinted at Pet. App. B, infra, pg. 19.

The jurisdiction of this Court is invoked under Title 18, United States Code, Section 1254 (1) and Rule 38 (b) of the Federal Rules of Criminal Procedure.

Statement of the Case

The Petitioner, Maurice Benjamin, was charged in a fifty-six count indictment with one count of wire fraud in violation of Title 18, United States Code, Section 1343, three counts of mail fraud in violation of Title 18, United States Code, Section 1341, three counts of bank fraud in violation of Title 18, United States Code, Section 1014 and one count of conspiracy to commit wire, mail and bank fraud in violation of Title 18, United States Code, Section 371.

The Petitioner was convicted after a jury trial in the United States District Court for the Southern District of New York of having violated both the conspiracy and substantive counts with which he was charged in the indictment. Judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi) was rendered on June 1, 1981.

The Petitioner was sentenced to six years imprisonment and a fine of $29,000. The sentence was imposed as follows —four years on the wire fraud count, two years each on the three mail fraud counts to run consecutive to each other and concurrent to all of the other counts, two years each on the three bank fraud counts to run consecutive to each other and concurrent to all of the other counts, and four years on the conspiracy count to run concurrent to all of the other counts.

In substance, the Petitioner was charged along with five other defendants of using checks drawn on the First National Bank of Tehran ("FNBT"), a purportedly fictitious off-shore bank, as a part of a scheme and artifice to defraud

The substantive counts against Benjamin at trial concerned the purchase by Big Rock Foods over a period of two weeks in November, 1978 from Mrs. Amelar, an 84 year old widow and President of Joseph Amelar, Inc., a wholesale meat company of over $84,000. worth of processed hams for resale with a series of three First National Bank of Tehran ("FNBT") checks which appeared to have been certified by "FNBT". These checks were deposited by Amelar with its New York bank, Marine Midland, who in turn sent them through the mail to the First National Bank of Tehran in St. Vincent for collection. These mailings were not the mailings set forth in the mail fraud counts. Thereafter, Marine Midland sent a follow-up telex to the issuing St. Vincent "bank" regarding the non-payment of the St. Vincent checks. Approximately one month later, having obtained in effect a month's credit from Amelar, Benjamin replaced the first Tehran check for $15,000 with a bona fide certified check from Bankers Trust. As a result of other payments, Amelar & Co., lost approximately $40,000.00 in its dealings with Benjamin.

Maurice Benjamin's defense on these charges was based on a claim that the transactions were factoring transactions between Big Rock Foods and Process Meats, a company owned by Anthony DeAngelis. Moreover, Benjamin attempted to show that Joseph Amelar & Co., was to apply monies received from Process Meats which in turn had received funds from the factoring of Big Rock Food's accounts receivable.

Prior to trial, Petitioner's attorney moved to dismiss the mail and wire fraud counts contending that neither the mail or wire was used in furtherance or in execution

of the alleged scheme and artifice to defraud. A motion was also made to dismiss the bank fraud as the Petitioner had not sought an extension of credit or any advance from the Marine Midland Bank where the three checks were deposited. All the motions were denied. The motions were renewed at the close of the government's case and again at the close of the entire case. Also, the Petitioner's attorney moved for a dismissal of the conspiracy count on the basis of the government having alleged one continuing conspiracy among the defendants but having proven muliple, separate and distinct conspiracies and having failed to prove that Petitioner was a member of the conspiracy alleged in the indictment. All of Petitioner's motions were denied.

During most of the trial Petitioner was incarcerated because of a prior federal conviction On November 25, 1981, after completing the sentence he was serving, he was released on bail in this case by Judge Gagliardi. Less than one month after his release on bail, the Petitioner's bail was revoked.

From June 1, 1981, until November 25, 1981, when Petitioner was released on bail by Judge Gagliardi, the Petitioner was incarcerated in various federal prisions outside of the New York area. Petitioner had retained the law firm of Rockman, Platzer & Fallick to prosecute his appeal. He had very little time to confer with his appeal counsel before he was shipped to a federal prison outside of New York. Appeal counsel completed his brief on August 19, 1981. The Petitioner did not see the brief or have an opportunity to review its contents until on or about October 28, 1981. At that time, he sent a Mailgram to his appeal attorney and to the Court of Appeals seeking an adjournment of the oral argument so that he could have the brief corrected and could respond to the government's brief. Copies of the Mailgrams are reprinted at Pet. App. C, Infra, Pgs. 20-22. The Court below denied the Petitioner's application.

The brief submitted by the Petitioner's attorney did not address itself to the issues of whether the mail and wire fraud counts was used in furtherance or in execution of the alleged fraud and artifice to defraud It did not address itself to the question of multiple conspiracies and the variance of the government's allegation of one conspiracy and proof of separate and distinct conspiracies. It did not address itself to the issue that the government failed to prove beyond a reasonable doubt that Petitioner was a member of the conspiracy alleged in the indictment or the prejudicial spillover to the Petitioner because of the joint trial of separate and distinct conspiracies. All of these issues were raised during the trial. Petitioner's attorney only addressed himself to the bank fraud counts and used the same arguments on appeal with regard thereto as were established by trial counsel. The conviction on these counts were reversed.

Reason for Granting Writ

The law to be presented for review will assert that the *Sixth Amendment* to the *United States Constitution* guarantees the Petitioner counsel during every stage of the criminal proceeding, including the appeal. It is the contention of the Petitioner that he was denied counsel during his appeal by being incarcerated some 1,200 miles away from his attorney during the preparation of his appeal brief and being denied an adjournment of oral argument when he first saw the brief after it was already filed and asserted that it was deficient and requested an adjournment from the Court of Appeals so that his attorney could amend the brief or address the areas in which it was deficient during oral argument.

A defendant is entitled to counsel at every stage in the criminal proceedings against him. *Powell* v. *State of Alabama*, 53 S. Ct. 55, 287 U.S. 45, 77 L Ed 158 (1932).

The right to counsel begins when the defendant is first taken into custody or otherwise deprived of his freedom in any significant way. *Miranda* v. *State of Arizona*, 86 S. Ct. 1602, 348 U.S. 436, 16 L Ed 2d 694 (1966). He is entitled to the assistance of counsel until he has exhausted his right to appeal. *Anders* v. *State of California*, 87 S. Ct. 1396, 386 U.S. 738, 18 L. Ed. 2d (493) (1967). The right to the assistance of counsel means the effective assistance of counsel. *Powell* v. *State of Alabama*, supra, *Anders* v. *State of California*, supra. It is the Petitioner's contention that he has been denied effective assistance of counsel with regard to his appeal filed with the United States Court of Appeals For the Second Circuit. The Petitioner was some twelve hundred miles away from his attorney and incarcerated in prison while his appeal was being prepared. He was unable to communicate with his appeal counsel during the preparation of his brief. He did not see the brief that was prepared by his counsel until after it was filed with the Court of Appeals which was approximately one week before the case was scheduled for oral argument. He did not know the grounds his counsel had set forth in the appeal until he saw the appeal. He did not have an opportunity to read the government's answering brief. It is the Petitioner's contention that he has a right to confer with and assist counsel in the preparation of his appeal and that a denial of that right results in his being denied effective assistance of counsel. This contention of the Petitioner was raised by him with his counsel and the Court of Appeals prior to oral argument. Under such circumstances, as the Court of Appeals denied Petitioner's motion for an adjournment of oral argument so that he might have the opportunity to confer with counsel, review the brief and suggest changes in Petitioner's brief and have counsel prepare a reply brief, it is Petitioner's contention that he has been denied effective assistance of counsel.

The Petitioner contends that he was under medication during the trial which affected his memory and prevented him from assisting trial counsel. He did not learn of this fact until after trial. However, his trial counsel did make a record during the trial that the defendant seemed to be having a problem remembering relevant and material facts and that trial counsel was having difficulty communicating with the defendant because of this during the trial. The Petitioner wanted this issue raised in this appeal.

Trial counsel had moved to dismiss the mail fraud counts which were counts 43, 44 and 45 of the indictment. The basis of the motion was that the mailings were not an integral part of the alleged artifice and scheme to defraud and were not made in furtherance of or in execution of the alleged scheme and artifice to defraud. The letters were collection letters sent by the Marine Midland Bank to the First National Bank of Teheran seeking information concerning three checks which had previously been sent by the Marine Midland Bank to the First National Bank of Teheran for collection. These letters were not transmittal letters whereby the checks were mailed to the First National Bank of Teheran for collection. This issue was not raised by Petitioner's counsel on appeal. It is not a frivolous issue.

Count 29 of the indictment alleges use of the wire in furtherance of an alleged scheme and artifice to defraud. The wire in question was sent on December 26, 1978 and was an inquiry as to what had happened to the three checks that had been sent to the First National Bank of Teheran in November, 1978. Trial counsel moved to dismiss the wire fraud count as use of the wire was not an integral part of the alleged scheme and artifice to defraud and because the wire was not sent in furtherance of or in execution of the alleged artifice and scheme to defraud. The motion was denied. Appeal counsel did not raise this issue on the appeal. Again, it is not a frivolous issue.

Trial counsel had moved to dismiss the conspiracy count on the ground of a variance between the indictment that alleged one continuing conspiracy and the proof at trial that showed multiple conspiracies without a common goal and on the ground that the Petitioner was not a party to the conspiracy alleged in the indictment. Trial counsel argued that the misjoinder had caused substantial prejudice to the Petitioner because of the spillover effect of the mass trial. Counsel on the appeal did not raise this issue. This issue is not frivolous.

The only counts challenged on the appeal were counts 43, 44 and 45 which alleged bank fraud. Trial counsel moved to dismiss these counts during trial as the Petitioner did not seek an advance or other extension of credit from the Marine Midland Bank. The motion was denied. Appeal counsel adopted trial counsel's argument in his brief and all three counts were reversed.

The brief on appeal did not raise all of the real issues of law as to errors in the trial and with regard to the trial court's denial of trial counsel's motions for dismissal of each count in the indictment that charged the Petitioner with a crime. The Petitioner recognized the deficiencies in his brief and sought an adjournment of oral argument so that his brief could be amended. His pro-se motion was denied.

All of the circumstances surrounding the preparation and filing of the appeal brief show that the Petitioner was denied effective assistance of counsel during his appeal. He could not participate in the appeal stage of his criminal prosecution. Petitioner contends that he had a right to participate with his counsel in the preparation of his appeal and that his inability to so participate resulted in his counsel filing a brief that omitted errors at trial which could have resulted in the reversal of all of the counts on which he was convicted.

Conclusion

It would be appropriate for the Court to grant review of this case to delineate and articulate on the marked facts of this case the parameters which would constitute effective assistance of counsel during an appeal.

Respectfully submitted,

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Dated: June 24, 1982

Appendix A, Opinion, United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1981
Decided: April 1, 1982
Nos. 278, 279, 280, 281, 282, 370, 371
Argued: October 27, 1981
Docket Nos. 81-1192, 1195, 1196, 1197
1203, 1204, 1254

(SEAL)

UNITED STATES OF AMERICA,

Appellee,

v.

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,

Defendants-Appellants.

Before MOORE and NEWMAN, *Circuit Judges* and GRIESA,* *District Judge.*

Appeals from judgments of conviction of the District Court of the Southern District of New York (Hon. Lee P. Gagliardi) on various counts of fraud involving financial instruments issued by fictitious off-shore banks. The convictions are affirmed, except as to certain of the counts against defendants Krown and Benjamin which charge the passing of worthless checks in violation of 18 U.S.C. § 1014.

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* The Honorable Thomas P. Griesa of the United States District Court for the Southern District of New York, sitting by designation.

The convictions on these counts are reversed on the ground that the statute does not apply to such conduct.

CAROLYN HANNEMAN, Esq., Assistant United States Attorney (JOHN S. MARTIN, JR., United States Attorney for the Southern District), for the Appellee.

KEVIN KROWN, New York, New York, Defendant-Appellant *Pro Se.*

BARRY M. FALLICK, Esq., New York, New York (Rochman, Platzer & Fallick), for Defendant-Appellant Maurice Benjamin.

THOMAS F. LIOTTI, Esqs., Carle Place, New York, for Defendant-Appellant Feeney.

THEODORE KRIEGER, Esq., New York, for Defendant-Appellant Rosten.

JOSEPH P. HOEY, Esq., Mineola, New York (Suozzi, English, Cianciulli & Peirez, P.C.), for Defendant-Appellant Rosen.

BARRY A. BOHRER, Esq., New York, New York, for Defendant-Appellant Costanzo.

GRIESA, *District Judge:*

Kevin Krown, Maurice Benjamin, James Feeney, Henry Rosten, Roger Rosen and Anthony Costanzo appeal from judgments of the District Court for the Southern District

of New York, following a five-week jury trial before Hon. Lee P. Gagliardi, convicting each of them on multiple counts of violation of federal anti-fraud statutes.

We affirm the convictions, except that we reverse as to two counts (53 and 54) of the 49 counts on which Krown was convicted, and as to three counts (53, 54 and 55) of the eight counts on which Benjamin was convicted.[1] Counts 53, 54 and 55 of the indictment charge these defendants with passing worthless checks in violation of 18 U.S.C. § 1014. We hold that this statute is inapplicable to the type of conduct charged.

The proof at trial showed a fraudulent scheme built around two fictitious off-shore banks called First London Bank and Trust Co. and First National Bank of Teheran purportedly located in St. Vincent, West Indies. Large amounts of money were obtained from various victims by the use of fraudulent financial instruments held out as being issued by these banks.

We have considered all the issues raised on appeal, and find that all are without merit except the challenge to the applicability of § 1014.

I.

The facts relevant to this issue are as follows. In November 1978 a company connected with Benjamin purchased certain quantities of meat from a wholesale supplier, one Theresa Amelar. In payment for the first two

---

[1] Krown was sentenced to 15 years imprisonment and was fined a total of $86,000. Benjamin was sentenced to 6 years imprisonment and was fined a total of $29,000. The partial reversals as to Krown and Benjamin will not reduce their terms of imprisonment. However, Krown's fines will be reduced by $10,000 ($5,000 on each of the two reversed counts), and Benjamin's fines will be reduced by $15,000 ($5,000 on each of the three reversed counts).

shipments Benjamin gave Mrs. Amelar two purported certified checks drawn of First National Bank of Teheran ("FNBT") in the amounts of $15,000 and $45,000.

Mrs. Amelar deposited these checks in her account at Marine Midland Bank. Marine Midland put these checks into the federal clearinghouse system for collection. They were promptly returned to Marine Midland stamped "No Such Bank." Mrs. Amelar informed Benjamin of this. Benjamin said to have Marine Midland mail the checks directly to St. Vincent for collection. Accordingly, the checks were resubmitted to Marine Midland, which mailed them to St. Vincent.

While this process was going on, Benjamin placed an order with Mrs. Amelar for a third shipment of meat. This order was filled, and Benjamin gave Mrs. Amelar a third purported certified check drawn on FNBT. This check was for $29,919.32, and was deposited with Mrs. Amelar's account at Marine Midland, which mailed the check directly to St. Vincent for collection.

Later, Benjamin obtained a genuine Bankers Trust Company certified check for $15,000. He sent it directly to Marine Midland for deposit in Mrs. Amelar's account. This was done in order to make it appear to Mrs. Amelar that the original $15,000 FNBT check had been honored.

Ultimately, of course, Marine Midland's efforts to collect the three checks from FNBT were fruitless. Although the amounts of the three fraudulent checks were temporarily credited to Mrs. Amelar's account, by way of a bookeeping entry, there is no evidence that Mrs. Amelar made any withdrawal from her account or received a payment of any kind from the bank, based on the balance created by the three checks.

It does not appear that Krown participated directly in the dealings with Mrs. Amelar, although it was he who "created" the fictitious FNBT.

Appendix A

Marine Midland Bank is a bank w ose deposits are insured by the Federal Deposit Insurance Corporation.

II.

Section 1014 provides in pertinent part:

> "Whoever knowingly makes any false statement or report, or wilfully overvalues any land, property or security, for the purpose of influencing in any way the action of. . .any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . .upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisioned not more than two years, or both."

Judge Gagliardi charged the jury on the elements which needed to be proved for conviction on the § 1014 counts:

> "The essential elements which must be proved in order to establish this offense any defendant are:
>
> 1. That the defendant in question knowingly made, or aided and abetted the making of the false statement or overvaluation concerning a material fact;
>
> 2. That the statement was made for the purpose of influencing the bank's action with respect to an application or advance, commitment or loan;
>
> 3. That the bank was insured by the FDIC."

In his explanation of the term "overvaluation" in the first element, the judge made it clear that he was referring to the overvaluation of security within the language of § 1014, and stated to the jury that a check, about which a false

statement has been made as to its value, would be an overvalued security.

Thus, under the trial judge's instruction, the jury was permitted to find Benjamin and Krown guilty under § 1014, if the jury found that they made or caused to be made a false statement or overvaluation of security which had the purpose of influencing a bank upon an advance, loan, application or commitment.

An initial question is whether the statute is limited to frauds committed directly against the financial institutions referred to in the statute. Benjamin's fraud was directed primarily against Mrs. Amelar. Benjamin did not deal directly with Marine Midland, except in the one instance when he sent the $15,000 Bankers Trust check for deposit in her account.

The statute is not limited by its terms to direct dealings with banks. It covers the making of false statements "for the purpose of influencing in any way" the action of an FDIC insured bank upon certain types of transactions. Thus, the statute is broad enough to apply to fraudulent dealings with third persons where it could *also* be said that there was the purpose to influence a bank upon one of the transactions named in the statute.

In the present case, when Benjamin gave the first two FNBT checks to Mrs. Amelar, he must have known that she would deposit these checks in a bank. After Mrs. Amelar told Benjamin about the problem with the checks, Benjamin's suggestion to have Marine Midland send the checks directly to St. Vincent was designed to prolong the bank's collection process in order to gain time for further fraudulent dealings with Mrs. Amelar. With regard to the third FNBT check, Benjamin intended that the check be deposited in the bank and that the bank would undertake collection via mail to St. Vincent. Benjamin's deposit of the Bankers Trust check at Marine Midland was an addi-

tional act intended to maintain a facade of regularity in his dealings with Mrs. Amelar.

Thus Benjamin was using Marine Midland to facilitate his fraud against Mrs. Amelar. In terms of the statute, it can be said that he had "the purpose of influencing" Marine Midland to accept the certified checks for deposit in Mrs. Amelar's account and to process those checks for collection over as long a time as possible.

This brings us to the issue of whether the certified FNBT checks were false statements or overvalued security within the meaning of § 1014, and the further issue of whether Benjamin had the purpose of influencing the bank in connection with any advance, loan, application or commitment.

It would seem clear that a fraudulent certified check can be a false statement within the meaning of § 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation. It would also appear that a worthless check could, under certain circumstances, constitute overvalued security for an advance, loan or commitment.

However, there is no basis in the evidence for a finding that Benjamin had the purpose of influencing the bank to use the FNBT checks in connection with an advance, loan, application or commitment. The interpretation of these terms in the statute has produced a split in the circuit decisions. The Fifth Circuit has held that the deposit of worthless checks in a bank and subsequent withdrawal of funds based upon those checks, can constitute an advance or loan within the meaning of § 1014. *United States* v. *Williams*, 639 F.2d 1311 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3375 (Nov. 10, 1981) (No. 80-2116); *United States* v. *Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). Both of these cases involved check kiting schemes. The theory of these decisions is that the banks granted immediate credit to the depositors by permitting withdrawals from the account prior to the collec-

tion of the deposited checks, and that such immediate credit was an advance or loan. The Third Circuit, declining to follow the *Payne* and *Williams* decisions, has held § 1014 inapplicable to a check kiting scheme. *United States* v. *Sher*, 505 F. Supp. 858 (W.D. Pa.), *aff'd per curiam*, 657 F.2d 28, *reh'g en banc denied*, 661 F.2d 34 (3d Cir. 1981). The *Sher* decision relied upon the reasoning in *United States* v. *Pavlick*, 507 F. Supp. 359 (M.D. Pa. 1980). The Third Circuit cases express concern about the possibility that an expansive reading of § 1014 will make that statute a general criminal remedy against the passing of worthless checks, contrary to Congerissional intent.

We agree that § 1014 is not designed to have general application to the passing of worthless checks, and that the language of the statute, limiting it to the specified credit transactions, must be given effect. The Second Circuit has warned against construing § 1014 in such a manner as to transform what would normally be state criminal offenses into federal crimes. *United States* v. *Sabatino*, 485 F.2d 540, 543 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974).

It is unnecessary for use to choose between the Fifth Circuit and Third Circuit views regarding the applicability of § 1014 to check kiting schemes, because the present case does not involve check kiting. Also, it is unnecessary for us to decide whether the granting of immediate credit by a bank, in the form of permitting a withdrawal of funds prior to the collection of a deposited check, constitutes an advance or loan within the meaning of § 1014. In the present case there was no such granting of immediate credit or permission to withdraw funds. All that occurred between Mrs. Amelar and the bank was that she deposited the checks in her account, following which the bank made a bookkeeping entry showing the checks credited to her account, and then attempted to collect the checks. Mrs. Amelar received no funds from the bank based upon the

three fraudulent checks, either in the form of a conventional advance or loan or by way of a withdrawal from her account. The mere bookkeeping credit entry did not constitute an advance or loan within the meaning of § 1014.

Not only was there in fact no advance or loan to Mrs. Amelar, but there is no evidence that Benjamin had the purpose of influencing the bank in connection with an advance or loan. The mere intent to have the bank accept the certified checks for deposit and carry out collection procedures is not sufficient to violate the statute.

It is equally true that there was no "application" or "commitment," or any evidence of a purpose by Benjamin to cause such. These broad terms must be interpreted with reference to the statute as a whole, and can only refer to an application or commitment involving an advance or loan or other credit transaction listed in the statute. *See United States* v. *Pavlick*, 507 F. Supp. 359, 362 (M.D. Pa. 1980). The case relied upon by the Government for the proposition that there was a commitment in the present case, *United States* v. *Stoddart*, 574 F.2d 1050 (10th Cir. 1978), is distinguishable. That case involved an agreement by a bank to permit a withdrawal from an account following a fraudulent representation to the bank by the depositor.

For the foregoing reasons Benjamin's conviction on the § 1014 counts cannot stand. The convictions of Krown on these counts must also fall, since Krown's liability could only derive from that of Benjamin.

The convictions are affirmed, except as to Counts 53 and 54 against Krown and Counts 53, 54 and 55 against Benjamin. As to these counts, we reverse and remand with directions to enter judgments of dismissal.

Appendix B, Order extending time to file petition for Writ of Certiorari

Supreme Court of the United States

No. A-1033

MAURICE BENJAMIN,

Petitioner,

v.

UNITED STATES

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 30, 1982.

/s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 2nd
day of June, 1982

Appendix C, Mailgram

Mailgram Service Center
Middletown, Va. 2264

28 OCT 1981

4-061695s300 10/27/81 ICS IPMMTZZ CSP NYAB
2127729870 MGM TDMT New York NY 523 10-27 0915P EST

Court of Appeals
Attn Judge Moore Judge Newman Judge Griesa
SDNY Foley Square 17 FL
New York NY 10007

Copy of Mailgram to: Barry Fallick Esquire, 230 Park Ave Room 1360, New York NY .0169

RE: 81-1192 U.S. vs. Benjamin

Talking to you today was an amazement, when I told you I had not been consulted regarding the appeal, you called me a liar, what could I have been consulted with? Your entire appeal is based on cases, I am no lawyer, there are many more items in the appeal, for instance the conspiracy charge, the individual counts charging me with illegal acts that were legal, the mistake in the printing, its language, and now being drugged systematically during the entire trial, for the longest period of time you have been telling me that you won't work without money, and then when I said I am sending a messenger to you to pick up your bill, you then said that you would give her a copy of the government's answer of 78 pages, two days before the argument before the Appeals Court, and 1200 miles away from where I am. I haven't seen you for four months, yet you would not even accept my calls even though I paid for all prior calls made to you.

I realize that you must be paid and for that reason, I borrowed $12,500 to give to you. I have no more money and your attitude toward me and the way you have handled

my appeal without my help leaves me to believe that your argument will not have the full force and effect required. For that reason, I wish for the Appeals Court to give me a postponement pending my hearing before Judge Gagliardi for bail on November 4 at 9 AM, and my removal from Springfield Missouri near the place and the attorney where my appeal is being heard and held. Inform the Court that there are two appeals to be heard and that is the reason it was illegal for the Court to commit me to imprisonment in both cases and not allowed to consult or advise and keep me 1200 miles away so that I was unable to help, you realize of course that you did not go through this trial with me and were hired much after the trial to handle the appeal and you should have used my help to prepare this appeal.

I think that your attitude in the past four months leaves me to believe you will not put forth your full efforts, therefore, I beg of you to show this Mailgram to the Court and ask for a postponement of at least two to four weeks so that I may be able to come back to New York to correct any mistakes in the Government's answer which I have never seen because you only gave it to my messenger two hours ago, CCS: Court of Appeals Attn Judge Moore, Judge Newman Judge Griesa Second Circuit SDNY, Foley Square 17 FL, New York NY 10007

Judge Lee Gagliardi, SDNY Foley Square New York, 10007

Maurice Benjamin
02111-054
Springfield Missouri

21:23 EST

MGMCOMP

Appendix C

Mailgram Service Center
Middletown, Va. 22645

4-022102S298 10/25/81 ICS IPMMTZZ CSP NYAB
5164317614 MGM TDMT Long Beach NY 234 10-25 0508P
EST

U S Appeals Court SDNY
17 Floor
Foley Square
New York NY 10007

Please have this Mailgram delivered to the attention of the Judges of the Appeal Court scheduled to hear the Appeal this week on 81-1192 U S versus Benjamin.

Because I have been incarcerated at Sprngfield Missouri for the last 70 days, I did not see or read or help in the preparation of this appeal before or after it was printed or filed. I take exception to some of the items in this brief which I understand is to be argued this week.

I respectfully request an adjournment for that reason and ask for a postponement of the argument. In addition, I have not seen the Governments answer to my appeal. I therefore ask the Appeals Court for an extension of time for argument until I am released on bail by Judge Gagliardi some time next week.

My attorney in New York has not conferred with me because of the distance of the incarceration and my use of the phone here is severly restricted. My jail term was up last week and I am entitled to bail by law. Judge Gagliardi has ask the U S Attorney to release me from Springfield Missouri and bring me to the Southern District of New York, for that reason I ask a postponement of the argument on appeal.

Maurice Benjamin 02111-054 Springfield Mo.

17:07 EST

MGMCOMP

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No. 81-2396

In the Supreme Court of the United States

OCTOBER TERM, 1982

MAURICE BENJAMIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner's only contention in this Court is that he was denied effective assistance of appellate counsel because his attorney failed to consult him in preparing the brief filed in the court of appeals.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy, four counts of mail and wire fraud, and three counts of making fraudulent statements in bank records, in violation of 18 U.S.C. 371, 1014, 1341, and 1343. He was sentenced to six years' imprisonment and $29,000 in fines. The court of appeals affirmed all but the bank fraud convictions, reducing petitioner's fine to $14,000.[1]

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[1]Petitioner's five co-defendants were convicted of conspiracy and a number of substantive offenses. With one exception, their convictions were affirmed on appeal; the court reversed the bank fraud convictions of one of petitioner's co-defendants.

1. The evidence showed that petitioner and his co-conspirators defrauded a number of individuals and a financial institution, using a fictitious bank ostensibly located in St. Vincent, West Indies. The "bank" was founded by one of petitioner's co-conspirators. It had neither assets nor tellers and performed no financial services (Tr. 212). Two employees answered telephones and responded to inquiries. When necessary, they also verified the legitimacy of the bank's certified checks and other financial instruments (Tr. 342-343). The conspirators printed an advertisement in a banking directory and distributed copies of the advertisement, which claimed bank assets in excess of $250 million. The advertisement was used to lure and convince intended victims (Tr. 348, 613, 647). Some of the conspirators duped businessmen in need of financial assistance by arranging "loans" for them from the fictitious bank for an advance fee payment, generally about 10% of the face amount of the loan. Others, including petitioner (Pet. App. 12-14), cashed worthless checks drawn on the bank or used the checks to pay unwitting merchants for various goods or services.

2. After petitioner's conviction, he was taken to the Medical Center for Federal Prisoners in Springfield, Missouri, to serve the remainder of a sentence on a prior federal conviction. A few days before this case was argued in the court of appeals, but several months after his attorney had filed a brief on his behalf, petitioner sent two mailgrams to the court of appeals. In one of the mailgrams, petitioner indicated that he took "exception to some of the items in [the] brief," and requested postponement of the argument (Pet. App. 22). In the other, which apparently was a copy of a mailgram to his attorney, petitioner stated that he believed there were (Pet. App. 20) "many more items in the appeal, for instance the conspiracy charge, the individual counts charging me with illegal acts that were legal, the mistake in the printing, its language, and now being drugged systematically during the entire trial."

3. Petitioner's ineffective assistance of counsel claim should not be considered in this Court for the first time. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). Moreover, petitioner's claim is predicated in large measure on unresolved factual assertions, such as that petitioner was not consulted in the preparation of the brief (see Pet. App. 20).[2] The courts of appeals generally refuse to consider effective assistance of trial counsel claims raised for the first time on appeal for similar reasons. See, *e.g.*, *United States* v. *Sturm*, 671 F. 2d 749, 750-751 (3d Cir. 1982); *United States* v. *Lurz*, 666 F. 2d 69, 78 (4th Cir. 1981); *United States* v. *Aulet*, 618 F. 2d 182, 185-186 (2d Cir. 1980); *United States* v. *Schreiber*, 599 F. 2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 843 (1979). "Such claims typically require * * * consider[ation] [of] allegations and evidence that are outside of the trial record." *United States* v. *Sturm*, *supra*, 671 F. 2d at 750-751; see *United States* v. *Lurz*, *supra*, 666 F. 2d at 78. Therefore, in the first instance, such claims should be raised in the district courts by motion pursuant to 28 U.S.C. 2255, permitting development of the necessary record and resolution of any contested factual issues.

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[2]Petitioner suggests that the court of appeals abused its discretion and contributed to the denial of his right to effective appellate counsel by denying his request for postponement of oral argument. The court's denial of petitioner's request was well within its discretion. First, petitioner's request for postponement was made just a few days before the argument. Second, the reason given for the requested postponement was the vague statement that petitioner took "exception to some of the items in th[e] brief" filed on his behalf. (Pet. App.22). The explanation offered for the belated assertion of these "exceptions" was that petitioner had not seen the brief "because" he had been incarcerated. *Ibid.* Without more, the court of appeals reasonably refused this last minute request for delay in a case scheduled for argument with the appeals of five other defendants. In any event, the significance of the denial of postponement depends on whether petitioner in fact consulted with his attorney in preparing the appeal or whether he had been unable to do so for some reason beyond his control, for which his attorney or the government was to blame.

There is no reason to hold this case pending disposition of *Jones* v. *Barnes*, cert. granted, No. 81-1794 (June 7, 1982). The question presented in that case is whether appellate counsel's failure to raise each of the non-frivolous arguments suggested by his client constituted ineffective assistance of counsel. Petitioner does not assert and, on the record in this case, it cannot be determined whether petitioner requested his attorney, before the appeal brief was filed, to raise any of the claims that he now suggests (Pet. 7-8) should have been raised on appeal. Even if there were an affirmance in *Jones* v. *Barnes*, therefore, this case would require additional factual development before it could be ascertained whether petitioner might benefit from such a result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1982

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